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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 430

ISAAC GAYNOR, PETITIONER,

vs.

AGWILINES, INC.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR CERTIORARI FILED OCTOBER 18, 1948.

CERTIORARI GRANTED NOVEMBER 22, 1948.

IN THE
United States Circuit Court of Appeals
FOR THE THIRD CIRCUIT.

No. 9580.

ISAAC GAYNOR,

Appellant;

v.

AGWILINES, INC.

Appeal From Orders of the District Court of the United
States for the Eastern District of Pennsylvania.

Appendix to Brief for Appellant.

ABRAHAM E. FREEDMAN,
FREEDMAN, LANDY AND LORRY,

900 Jefferson Building,
1015 Chestnut Street,
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Attorneys for Appellant.

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RELEVANT DOCKET ENTRIES.

- Aug. 27, 1946. Complaint filed.
- Aug. 27, 1946. Summons exit.
- Aug. 27, 1946. Plaintiff's demand for jury trial filed.
- Sept. 10, 1946.. Summons returned: "on Sept. 3, 1946 served" and filed.
- Sept. 30, 1946. Order of Court extending time for filing answer to October 30, 1946 filed. 10/1/46 noted.
- Oct. 30, 1946. Answer, filed.
- Mar. 27, 1947. Order to place case on trial list, filed.
- June 6, 1947. Order to place case on the Argument List on stipulation of facts filed.
- June 13, 1947. Stipulation of facts, filed.
- June 23, 1947. Argued sur pleadings and proofs. C. A. V.
- Nov. 26, 1947. Opinion, Ganey, J. dismissing action without prejudice filed.
- Nov. 26, 1947. Judgment dismissing action without prejudice filed. 11/28/47 noted and notice mailed.
- Dec. 11, 1947. Hearing sur motion for reargument. C. A. V.
- Dec. 29, 1947. Order of Court confirming conclusion reached in Opinion of Nov. 26, 1947 in conformity with a supplemental opinion to be filed, filed. 12/30/47 noted and notice mailed.

Relevant Docket Entries

- Dec. 31, 1947. Plaintiff's Notice of Appeal, filed. 1/2/48
Copy to Krusen, Evans and Shaw.
- Dec. 31, 1947. Copy of Clerk's Notice of Appeal to U. S.
Circuit Court of Appeals, filed.
- Jan. 21, 1948. Supplemental Opinion, Ganey, J., affirming
Opinion filed, Nov. 26, 1947 in accordance with Order filed Dec. 29, 1947,
filed.
- Jan. 23, 1948. Order of Court directing that original record
be transmitted to U. S. Circuit
Court of Appeals, filed. 1/26/47 Noted.
- Jan. 30, 1948. Designation of Record on appeal, filed.

STIPULATION OF FACTS.

1. Plaintiff, ISAAC GAYNOR, at all times mentioned herein, is and was a seaman in the United States Merchant Marine and was a citizen and resident of Philadelphia.
2. Defendant, AGWILINES, INC., is, and at all times mentioned herein, was a corporation duly organized and existing under and by virtue of the laws of the State of Maine.
3. On the 25th day of December, 1945, and at all times mentioned herein, the S. S. "Christopher Gadsden", was operated by defendant under an agreement of General Agency with the United States.
4. On the 10th day of September, 1945, plaintiff entered into shipping articles with the defendant as a member of the crew of the S. S. "Christopher Gadsden" in the capacity of utility man at the rate of \$87.50 plus bonus, overtime and found on a foreign voyage from Philadelphia, Pa., to undisclosed ports anywhere in the world and return; for a period not exceeding twelve months. A true and correct copy of the shipping articles are attached hereto and marked "Exhibit A." On October 1, 1945, the said rate of pay was increased to \$132.50 per month, plus bonus, overtime and found.
5. On the 24th day of December, 1945, while the S. S. "Christopher Gadsden" was berthed in the port of Charleston, South Carolina, plaintiff, having first obtained shore leave, left the vessel about 5:00 o'clock P. M. intending to visit relatives in Rand, South Carolina, plaintiff thereafter purchased a bus ticket from Charleston to Walterboro, which was the nearest stop to Rand, South Carolina.
6. On the 25th day of December, 1945, plaintiff boarded a Greyhound bus at Charleston, South Carolina, as a passenger and at or about 6:30 o'clock P. M., the said bus, en route to Walterboro, became involved in an accident on the

Stipulation of Facts

highway about thirty miles from Charleston, in connection with which plaintiff sustained certain injuries. See medical abstracts from the U. S. Marine Hospitals attached hereto and marked "Exhibits B, C and D."

7. As a result of the injuries aforesaid, plaintiff has been disabled and unable to re-engage in his occupation and has been under medical care up to the present time.

8. Plaintiff received earned wages covering the period from September 10, 1945, to December 28, 1945. A true and correct copy of the payroll voucher is attached hereto and marked "Exhibit E."

9. At the time the plaintiff left the S. S. "Christopher Gadsden" on December 24, 1945, he left on board certain of his clothing, baggage and personal effects. Plaintiff has demanded the return of the said personal effects and defendant has been unable to locate the said personal effects and has failed to make any accounting or to compensate plaintiff for their loss to the plaintiff. Plaintiff contends that the various items of personal effects are hereafter set forth in Exhibit "F."

FREEDMAN, LANDY AND LORRY,

By WILLIAM M. ALPER,

Attorneys for Plaintiff.

KRUSEN, EVANS AND SHAW,

By ROWLAND C. EVANS, JR.,

Attorneys for Defendant.

**SERVICE AGREEMENT FOR VESSELS OF WHICH
THE WAR SHIPPING ADMINISTRATION IS
OWNER OR OWNER PRO HAC VICE.**

THIS AGREEMENT, made as of March 8, 1942, between the UNITED STATES OF AMERICA (herein called the "United States") acting by and through the Administrator, War Shipping Administration, and AGWILINES, INC., a corporation organized and existing under the laws of Maine, and having its principal place of business at New York, New York, (herein called the "General Agent").

WITNESSETH:

That in consideration of the reciprocal undertakings and promises of the parties herein expressed:

ARTICLE 1. The United States appoints the General Agent as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it by the United States from time to time.

ARTICLE 2. The General Agent accepts the appointment and undertakes and promises so to manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe, and upon the terms and conditions herein provided, of such vessels as have been or may be by the United States assigned to and accepted by the General Agent for that purpose.

ARTICLE 3A. To the best of its ability, the General Agent shall for the account of the United States:

(a) Maintain the vessels in such trade or service as the United States may direct, subject to its orders as to voyage, cargoes, priorities of cargoes, charters, rates of freight and charges, and as to all matters connected with the use of the vessels; or in the absence of such orders, the General Agent shall follow reasonable commercial practices;

Service Agreement for Vessels

- (b) Collect all moneys due the United States under this Agreement and deposit, remit, or disburse the same in accordance with such regulations as the United States may prescribe from time to time, and account to the United States for all moneys collected or disbursed by it or its agents;
- (c) Equip, victual, supply and maintain the vessels, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe;
- (d) The General Agent shall procure the Master of the vessels operated hereunder, subject to the approval of the United States. The Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel. The General Agent shall procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel. Such officers and men shall be procured by the General Agent through the usual channels and in accordance with the customary practices of commercial operators and upon the terms and conditions prevailing in the particular service or services in which the vessels are to be operated from time to time. The officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds provided by the United States hereunder.
- (e) Issue or cause to be issued to shippers customary freight contracts and Bills of Lading. Unless the United States shall otherwise instruct, such Bills of Lading shall contain all exemptions and stipulations usual to the particular trade or service in which the vessels may be engaged, and reserve a lien upon all cargoes for the payment of freight, primeage charges,

dead freight, demurrage, forwarding charges, advance charges for carriage to port of shipment, for contributions in general average and special charges on cargo and for all fines or penalties which the vessels or cargoes may incur by reason of illegal, incorrect or insufficient marking or addressing of packages or description of their contents. After a uniform Bill of Lading shall have been adopted by the United States, such Bill of Lading shall be used in all cases as soon as practicable after receipt thereof by the General Agent, with such modifications as shall be necessary for the particular trades in which the vessels hereunder shall from time to time be employed. Pending the issuance of such uniform Bill of Lading, the General Agent may continue to use its usual commercial form of Bill of Lading.

As soon as practicable after April 1, 1942, all Bills of Lading shall be issued by the General Agent or its agents as agent for the Master and the signature clause may provide substantially that the General Agent makes no warranty or representation as to the authority of the United States or the Master to enter into the agreement, and that the General Agent assumes no liability with respect to the goods described therein or the transportation thereof.

ARTICLE 3B. The General Agent agrees, without prejudice to its rights under the provisions of Articles 8 and 16 hereof, to:

(a) Perform the duties required to be performed by it hereunder in an economical and efficient manner, and exercise due diligence to protect and safeguard the interests of the United States in all respects and to avoid loss and damage of every nature to the United States;

(b) Exercise due diligence to see that all Bills of Lading are properly issued, all wharf receipts for

8a
Service Agreement for Vessels

freight are non-negotiable, and, where required, a freight contract or permit is issued for each shipment;

(c) Furnish and maintain during the period of this Agreement, at its own expense, a bond with sufficient surety, in such amount as the United States shall determine, such bond to be approved by the United States as to both sufficiency of surety or sureties and form, and to be conditioned upon the due and faithful performance of all and singular the covenants and agreements of the General Agent contained in this Agreement, including, without limitation of the foregoing, the condition faithfully to account to the United States for all funds collected and disbursed and funds and property received by the General Agent or its agents. The General Agent may, in lieu of furnishing such bond, pledge direct or fully guaranteed obligations of the United States of America of the face value of the penalty of the bond under an agreement satisfactory in form to the United States;

(d) Without the consent of the United States, not sell, assign or transfer, either directly or indirectly or through any reorganization, merger or consolidation, this Agreement or any interest therein, nor make any agreement or arrangement whereby the service to be performed hereunder is to be performed by any other person, whether an agent or otherwise, except as provided in Article 6 hereof.

ARTICLE 4. (a) The General Agent and, to the extent required by the United States, every related or affiliated company or holding company of the General Agent, authorized as provided in Article 13 hereof, to render any service or to furnish any stores, supplies, equipment, provisions, materials, or facilities which are for the account of the United States under the terms of this Agreement, shall (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and

maintenance of the vessels covered by this Agreement in such form and under such regulations as may be prescribed by the United States; and (2) file, upon notice from the United States, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the United States, affect the results in, the performance of, or transactions or operations under this Agreement.

(b) The United States is hereby authorized to examine and audit the books, records and accounts of all persons referred to above in this Article whenever it may deem it necessary or desirable.

(c) Upon the willful failure or willful refusal of any person described in this Article to comply with the provisions of this Article, the United States may rescind this Agreement.

ARTICLE 5. At least once a month the United States shall pay to the General Agent as full compensation for the General Agent's services hereunder, such fair and reasonable amount as the Administrator, War Shipping Administration, shall from time to time determine: Provided, That with respect to vessels allocated before February 25, 1942, compensation shall not be less than the amount of earnings which the General Agent would have been permitted to earn under any applicable previously existing bareboat charters, preference agreements, commitments, rules or regulations of the United States Maritime Commission until the earliest termination date permissible thereunder as of March 22, 1942. Such compensation shall be deemed to cover, but without limitation, the General Agent's administrative and general expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than taxes for which the General Agent is reimbursed under Article 7 hereof), and any other expenses which are not directly and

exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder.

ARTICLE 6. The General Agent shall exercise due diligence in the selection of agents. Such agents shall be subject to disapproval by the United States and any agency agreement shall be terminated by the General Agent whenever the United States shall so direct. Any compensation payable by the General Agent to its agents for services rendered in connection with the vessels assigned hereunder shall be subject to approval by the United States. In the event that any of the vessels covered by this Agreement are operated in a service in which an American citizen maintained a berth operation with American flag vessels on September 1, 1939, the General Agent, upon request of the United States, will assign such vessels to such berth operators as agents as may be appropriate under form of agreement prescribed by the United States. Agency fees or equivalent allowances for branch offices in accordance with schedules approved by the United States will be reimbursable under Article 7 hereof.

ARTICLE 7. The United States shall reimburse the General Agent at stated intervals determined by the United States for all expenditures of every kind made by it in performing, procuring or supplying the services, facilities, stores, supplies or equipment as required hereunder, *excepting* general and administrative expense (as presently itemized in General Order No. 22 of the United States Maritime Commission), advertising expense, taxes (other than sales and similar taxes or foreign taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder) and any other expenses which are not directly or exclusively applicable to the maintenance, management, operation or the conduct of the business of the vessels hereunder. The General Agent shall be reimbursed for sales and similar taxes or foreign

taxes of any kind to the extent determined by the United States to be classifiable as voyage expenses hereunder if the General Agent shall have used due diligence to secure immunity from such taxation. To the extent not recovered from insurance, the United States shall also reimburse the General Agent for all crew expenditures (accruing during the term hereof) in connection with the vessels hereunder, including, without limitation, all disbursements for or on account of wages, extra compensation, overtime, bonuses, penalties, subsistence, repatriation, travel expense, loss of personal effects, maintenance, cure, vacation allowances, damages or compensation for death or personal injury or illness, and insurance premiums, required to be paid by law, custom, or by the terms of the ship's articles or labor agreements, or by action of the Maritime War Emergency Board, any payments made by the General Agent to a pension fund in accordance with a pension plan in effect on the effective date of this Agreement with respect to the officers and members of the crew of said vessels who are entitled to benefits under such plan, on the effective date of this Agreement, for the amount of any Social Security taxes which the General Agent is or may be required to pay on behalf of the officers and crew of said vessels as agent or otherwise. The United States may disallow, in whole or in part, as it may deem appropriate, and deny reimbursement for, expenses which are found to have been made in willful contravention of any outstanding instructions or which were clearly improvident or excessive.

Any moneys advanced to bonded persons by the General Agent for ship disbursements which are lost by reason of a casualty to the Vessel on which the money so advanced is carried shall in the event of such loss be considered an expense of the General Agent, subject to reimbursement as is in this ARTICLE 7 provided.

The United States may advance moneys to the General Agent to provide for disbursements hereunder in accordance with such regulations or conditions as the United States may from time to time prescribe.

ARTICLE 8. The United States, shall without cost or expense to the General Agent, procure or provide insurance against all insurable risks of whatsoever nature or kind relating to the vessels assigned hereunder (which insurance shall include the General Agent and the vessel personnel as assureds) including, but without limitation, marine, war and P. & I. risks, and all other risks or liabilities for breach of statute and for damage caused to other vessels, persons or property, and shall defend, indemnify and save harmless the General Agent against and from any and all loss, liability, damage and expense (including costs of court and reasonable attorneys' fees) on account of such risks and liabilities, to the extent not covered or not fully covered by insurance. The General Agent shall furnish reports and information and comply fully with all instructions that may be issued with regard to all salvage claims, damages, losses or other claims. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to such risks. The United States may assume any of the foregoing risks except those relating to P. & I. risks and collision liabilities. At all times during the period of this Agreement, the United States shall at its own expense provide and pay for insurance with respect to each vessel hereunder against protection and indemnity marine and war risks, and collision liabilities without limit as to liability as to the amount of any claim or the aggregate of any claims thereunder. The United States at its election may write all or any such insurance, including that against P. and I. and collision liabilities, in its own fund, pursuant to a duly executed policy or policies. Neither the United States nor the insurance underwriters shall have any right of subrogation against the General Agent with respect to any of the foregoing risks. All insurance hereunder shall cover both the United States and the General Agent.

ARTICLE 9. In the event of general average involving vessels assigned to the General Agent under this Agree-

ment, the General Agent shall comply fully with all instructions issued by the United States in that connection including instructions as to the appointment of adjuster, obtaining general average security and asserting liens for that purpose unless otherwise instructed, and supplying the adjuster with all disbursements accounts, documents and data required in the adjustment, statement and settlement of the general average. Reasonable compensation for and general average allowances to the General Agent in such cases shall be in accordance with directions, orders or regulations of the United States.

ARTICLE 10. Salvage claims for services rendered to vessels other than vessels owned or controlled by the United States shall be handled by, and be under the control of, the United States. Salvage awards for services rendered to other vessels owned or controlled by the United States including the vessels hereunder shall be made by the United States. The General Agent shall furnish the United States with full reports and information on all salvage services rendered.

ARTICLE 11. (a) The United States shall have the right to terminate this Agreement at any time as to any and all vessels assigned to the General Agent and to assume control forthwith of any and all said vessels upon fifteen (15) days' written or telegraphic notice.

(b) Upon giving to the United States thirty (30) days' written or telegraphic notice, the General Agent shall have the right to terminate this Agreement, but termination by the General Agent shall not become effective as to any vessel until her arrival and discharge at a continental United States port.

(c) This Agreement may be terminated, modified, or amended at any time by mutual consent.

ARTICLE 12. In case of termination of this Agreement, whether upon expiration of the stated period hereof or

otherwise, all vessels and other property of whatsoever kind then in the custody of the General Agent pursuant to this Agreement, shall be immediately turned over to the United States, at times and places to be fixed by the United States, and the United States may collect directly, or by such agent or agents as it may appoint, all freight moneys or other debts remaining unpaid: Provided, That the General Agent shall, if required by the United States, adjust, settle and liquidate the current business of the vessels. Notwithstanding the foregoing provisions, when the United States shall so direct, the General Agent shall complete the business of voyages commenced prior to the date as of which the Agreement shall be terminated, and, if directed by the United States and subject to any instructions issued by the United States with respect thereto, the General Agent shall continue to book cargo for the vessels for the next voyages after the termination of this Agreement. No such termination of this Agreement shall relieve either party of liability to the other in respect of matters arising prior to the date of such termination or of any obligation hereunder to indemnify the other party in respect to any claim or demand thereafter asserted, arising out of any matter done or omitted prior to the date of such termination.

ARTICLE 13. Agreements or arrangements with any interested or related company to render any service or to furnish any stores, supplies, equipment, materials, repairs, or facilities hereunder shall be submitted to the United States for approval as to employment. Unless and until such agreements or arrangements have been approved by the United States, compensation paid to any interested or related company shall be subject to review and readjustment by the United States. In connection with such review and readjustment, the United States may deny reimbursement hereunder of any portion of such compensation which it deems to be in excess of fair and reasonable compensation. The United States may also deny reimbursement, in

whole or in part, of compensation under any arrangement or agreement, with an interested or related company which it deems to be exorbitant, extortionate or fraudulent. The term "interested company" shall mean any person, firm, or corporation in which the General Agent, or any related company of the General Agent, or any officer or director of the General Agent, or any employee of the General Agent who is charged with executive or supervisory duties, or any member of the immediate family of any such officer, director or employee, or any officer or director of any related company of the General Agent or any member of the immediate family of an officer or director of any related company of the General Agent, owns any substantial pecuniary interest directly or indirectly. The term "related company", used to indicate a relationship with the General Agent for the purposes of this Article only, shall include any person or concern that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the General Agent. The term "control" (including the terms "controlled by" and "under common control with") as used herein means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of the General Agent (or related company), whether through ownership of voting securities, by contract, or otherwise.

ARTICLE 14. The General Agent shall, unless otherwise instructed, subject to such regulations, instructions, or methods of supervision and inspection as may be required or prescribed by the United States, arrange for the repair of the vessels, covering hull, machinery, boilers, tackle, apparel, furniture, equipment, and spare parts, and including maintenance and voyage repairs and replacements, for the account of the United States, as may be necessary to maintain the vessels in a thoroughly efficient state of repair and condition. The General Agent shall exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the

vessels, and so advise the United States from time to time, in order that the United States may satisfy itself that the vessels are being properly maintained, and shall cooperate with representatives of the United States in making any inspections or investigations that the United States may deem desirable.

ARTICLE 15. The United States shall, when it may legally do so, have the advantage of any existing, or future, contracts of the General Agent for the purchase or rental of materials, fuel, supplies, facilities, services, or equipment, if this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the General Agent.

ARTICLE 16. (a) The United States shall indemnify, and hold harmless and defend the General Agent against any and all claims and demands (including costs and reasonable attorneys' fees in defending such claim or demand, whether or not the claim or demand be found to be valid) of whatsoever kind or nature and by whomsoever asserted for injury to persons or property arising out of or in any way connected with the operation or use of said vessels or the performance by the General Agent of any of its obligations hereunder, including but not limited to any and all claims and demands by passengers, troops, gun crews, crew members, shippers, third persons, or other vessels, and including but not limited to claims for damages for injury to or loss of property, cargo or personal effects, claims for damages for personal injury or loss of life, and claims for maintenance and cure.

(b) In view of the extraordinary wartime conditions under which vessels will be operated hereunder, the General Agent shall be under no responsibility or liability to the United States for loss or damage to the vessels arising out of any error of judgment or any negligence on the part of any of the General Agent's officers, agents, employees, or otherwise. However, the General Agent may be held liable

for loss or damage not covered by insurance or assumed by the United States as required under Article 8 of this Agreement, if such loss or damage is directly and primarily caused by willful misconduct of principal supervisory shoreside personnel or by gross negligence of the General Agent in the procurement of licensed officers or in the selection of principal supervisory shoreside personnel.

(c) In the event that the General Agent shall perform any stevedoring, terminal, ship repair or similar service for the vessels hereunder at commercial rates, the General Agent shall have all the obligations and responsibilities of the person performing such services under the standard or other approved form of contract with the United States, or in the absence of such standard or approved form, under usual commercial practice.

(d) The General Agent shall be under no liability to the United States of any kind or nature whatsoever in the event that the General Agent should fail to obtain officers or crews for the operation of the vessels, or fail to arrange for the fitting out, refitting, maintenance or repair of said vessels, or fail to perform any other service hereunder by reason of any labor shortage, dispute or difficulty, or any strike or lockout or any shortage of material or any act of God or peril of the sea or any other cause beyond the control of the General Agent whether or not of the same or similar nature; or shall do or fail to do any act in reliance upon instructions of military or naval authorities.

ARTICLE 17. Wherever and whenever herein any right, power, or authority is granted or given to the United States, such right, power, or authority may be exercised in all cases by the War Shipping Administration or such agent or agents as it may appoint or by its nominee, and the act or acts of such agent or agents or nominee, when taken, shall constitute the act of the United States hereunder. In performing its service hereunder, the General Agent may rely upon the instructions and directions of the Adminis-

trator, his officers and responsible employees, or upon the instructions and directions of any person or agency authorized by the Administrator. Wherever practicable, the General Agent shall request written confirmation of any oral instructions or directions so given.

ARTICLE 18. (a) The General Agent warrants that it has not employed any person to solicit or secure this Agreement upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the United States the right to annul this Agreement or in its discretion to deduct from any amount payable hereunder the amount of such commission, percentage, brokerage or contingent fee.

(b) In any act performed under this Agreement, the General Agent and any subcontractor shall not discriminate against any citizen of the United States on the ground of race, creed, color or national origin.

ARTICLE 19. No person elected or appointed a member of or delegate to Congress or a Resident Commissioner, directly or indirectly, himself or by any other person in trust for him, or for his use or benefit, or on his account shall hold or enjoy this Agreement in whole or in part, except as provided in Section 206, Title 18, U. S. C. The General Agent shall not employ any member of Congress, either with or without compensation, as an attorney, agent, officer or director.

ARTICLE 20. Subject to the provisions of Article 5 hereof, this Agreement is in substitution of and hereby abrogates and replaces the so-called 1¢ Bareboat Charter Agreements relating to the assignment or allocation to the General Agent of the vessels listed on Exhibit A hereto from the dates stated on such Exhibit. Preference Agreements relating to such allocated vessels shall be terminated and abrogated as of the same dates.

All rights and obligations of the parties under said abrogated Bareboat Charter and Preference Agreements

are hereby cancelled and this Agreement is made retroactive to the cancellation dates thereof as stated on Exhibit A hereto. However, the General Agent shall be reimbursed for any expenditure made before the earliest permissible cancellation date after March 22, 1942, under said agreements to the extent that such expenditure would have been considered in computing additional charter hire or freight under such agreements. This Agreement, unless sooner terminated, shall extend until six months after the cessation of hostilities.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in triplicate the day and year first above written.

UNITED STATES OF AMERICA

By: E. S. LAND,
*Administrator, War Shipping
Administration.*

By D. F. HÓULIHAN,
For the Administrator.

AGWILINES, INC.,

By L. D. PARMELEE,
Exec. Vice Pres.

Attest:

A. G. DETT,
Secretary.

Approved as to form:

NAME (Illegible)
*General Counsel,
War Shipping Administration.*

Service Agreement for Vessels

I, A. G. Dett, certify that I am the duly chosen, qualified, and acting secretary of Agwilines Inc. a party to this Agreement, and, as such, I am the custodian of its official records and the minute books of its governing body; that L. D. Parmelee who signed this Agreement on behalf of said corporation, was then the duly qualified Executive Vice President of said corporation; that said officer affixed his manual signature to said Agreement in his official capacity as said officer for and on behalf of said corporation by authority and direction of its governing body duly made and taken; that said Agreement is within the scope of the corporate and lawful powers of this corporation.

A. G. DETT,
Secretary.

(CORPORATE SEAL)

DELIVERY CERTIFICATE.

WAR SHIPPING ADMINISTRATION.

December 31, 1942

THIS IS TO CERTIFY THAT the S/S CHRISTOPHER GADSEN, owned by the UNITED STATES OF AMERICA, represented by the WAR SHIPPING ADMINISTRATION, was on the 31st day of December, 1942, at 7:00 P. M., E. W. T., delivered at the port of Wilmington, North Carolina by War Shipping Administration to Agwilines, Inc. UNDER TERMS AND CONDITIONS OF "Service Agreement, Form GAA" said agreement having been executed March 8, 1942 having on board fuel, stores and equipment as per inventories taken on date of delivery.

WAR SHIPPING ADMINISTRATION

By (Sgd.) A. E. ROENTGEN

A. E. Roentgen

Supply Officer.

AGWILINES, INC.

By Southeastern Shipping Service

By (Sgd.) ROGER STURGES RILEY

Roger Sturges Riley

APPROVED:

(Sgd.) G. F. BLAIR

District Manager

War Shipping Administration

Port of Norfolk, Virginia

*Redelivery Certificate***REDELIVERY CERTIFICATE.**

RECEIPT FOR REDELIVERY OF THE S. S. "CHRISTOPHER
GADSEN"

(Official No. 242665)

The WAR SHIPPING ADMINISTRATION hereby accepts from AGWILINES, INC. redelivery of the S. S. "CHRISTOPHER GADSEN" as at 12:00 Midnight, Central Standard Time, June 18, 1946, at Galveston, Texas under Service Agreement, Form GAA (Contract, WSA-186, dated March 8, 1942) having on board fuel, water, stores and equipment as per inventories taken on the date of redelivery.

WAR SHIPPING ADMINISTRATION

By (Signed) W. G. YUNG

W. G. Yung

Operations Supervisor

AGWILINES, INC.

By (Signed) M. O. FANO

M. O. Fano

Assistant to Vice President

OPINION.

November 26, 1947

GANEY, J.:

This is a civil action for wages, maintenance and cure, and for the value of personal effects by a seaman against the defendant which operated a merchant vessel under a general agency agreement entered into between it and the United States through the War Shipping Administration.

The facts are not in dispute and they may be set forth briefly as follows: On September 10, 1945, the plaintiff signed shipping articles to become a member of the crew of the Steamship Christopher Gadsden in the capacity of a utility man at the rate of Eighty Seven and 50/100 Dollars (\$87.50) plus bonus, overtime and found for a voyage from Philadelphia, Pennsylvania, to any port in the world for a period not to exceed twelve months. The defendant operated the vessel under a general agency agreement with the United States through the War Shipping Administration. On October 1, 1945, the plaintiff's rate of pay was increased to One Hundred Thirty Two and 50/100 Dollars (\$132.50) per month. On December 24, 1945, while the vessel was in the port of Charleston, South Carolina, the plaintiff obtained shore leave. On Christmas Day, the plaintiff, with the intention of visiting his relatives in Rand, South Carolina, boarded a bus for Walterboro, which was the nearest stop to Rand. While it was on the highway, thirty miles from Charleston, the bus was involved in an accident in which the plaintiff was injured. As a result of the injuries sustained by him, he was unable to resume his usual occupation and duties, and, at least up to the time this action was brought, he has been under medical care. The plaintiff has received wages earned by him covering the period from September 10, 1945, to December 28, 1945. However, the defendant has refused the plaintiff's demand and claim for wages for the period from December 28, 1945 to the date of the unexpired portion of the voyage, for

Name of Ship

S/S CHRISTOPHER GADSDEN
Operating Company on This Voyage
 AGWILINES, INC., as gen agts. for
 W S A

It is also agreed that

ALL DECISIONS AMENDMENTS AND
 ATTACHMENTS OF THE MARITIME
 WAR EMERGENCY BOARD SHALL AP-
 PLY TO AND BECOME A PART OF THIS
 AGREEMENT

WAR SHIPPING ADMINISTRATION
 OPERATIONS REGULATIONS NOS. 55-72
 and 64 REVISED DATED JANUARY 6,
 1945, TO APPLY AND BECOME PART
 OF THIS AGREEMENT

In Witness Whereof the said parties have subscribed their names hereto on the days against their respective signatures mentioned.

(S.) John J. Kelly, Master, of 1005 Meadow Road,
 Glencoe, Ill., on the 7th day of September, 1945."

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
 FOR THE THIRD CIRCUIT

No. 9580

ISAAC GAYNOR, Appellant,

v.

AGWILINES, INC.

MOTION TO DISMISS APPEAL—Filed January 12, 1948

Appellant, Isaac Gaynor, by his counsel, Messrs. Freedman, Landy and Lorry, respectfully moves Your Honorable Court to dismiss the appeal taken in the instant matter without prejudice for the following reasons:

1. The within cause of action is by a seaman seeking to recover wages and maintenance and cure against the private operator of the vessel.

The vessel was owned by the United States, but was operated by the respondent, Agwilines, Inc., under the provisions of a so called general agency agreement.

maintenance and cure for the period of his disability, and for the value of his personal effects which he alleged were left aboard the vessel.

Before we may pass to the question of the liability of the defendant, we must first determine whether the plaintiff can maintain this action. In its answer to the complaint, the defendant alleged that the plaintiff has failed to comply with the provisions of the Clarification Act of 1943.¹ Section 1 (a) of the Act, 50 U. S. C. A. Appendix Sec. 1291 (a), as is pertinent here, provides: "Officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to . . . (3) collection of wages and bonuses . . . have all the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels . . .". The Act further provides: "Any claim referred to in clause . . . (3) hereof, shall if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act (Title 46, Secs. 741-752), notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act . . . When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with the rules or regulations prescribed by the Administrator, War Shipping Administration, . . .". (As of September 1, 1946, all functions, powers and duties of the War Shipping Administration have been transferred to the United States Maritime Commission²). On April 22, 1943, the War Shipping Administration issued General Order 32³ wherein were contained certain provisions requisite to

1. Act of March 23, 1943, c. 26, 57 Stat. 45-51, as amended, 50 U. S. C. A. Appendix, Secs. 1291-1295.

2. Section 202 of the Act of July 8, 1946, c. 543, Title II, 60 Stat. 501, 50 U. S. C. A. Appendix, Sec. 1291, note.

3. 8 F. R. 5414, 46 CFR, Cum. Supp. 304.20-304.29.

[fol. 44] 2. The cause was submitted to the Honorable J. Cullen Ganey without a jury, upon a stipulation of fact, but was dismissed without consideration of the merits of the case, for the reason that the respondent, as general agent, was not suable under the terms of the contract, and the libel was, therefore, dismissed. This appeal was taken from that dismissal.

3. It appears that most of the seamen's cases presently on the trial list in the United States District Court for the Eastern District of Pennsylvania involve the same general agency agreement as is involved in the instant case, and the district judges have, therefore, agreed to hear the argument by the Court en banc, in order to fix a uniform policy to govern all of the cases on the docket. The District Court has fixed February 10th as the date when it will sit en banc.

Wherefore, leave is respectfully requested to dismiss this appeal, so that the cause may be presented to the District Court for re-argument.

Freedman, Landy and Lorry, by (S.) Abraham E. Freedman.

[File endorsement omitted.]

[fol. 45] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

Present: Maris, Goodrich and O'Connell, Circuit Judges.

ORDER DENYING MOTION TO DISMISS APPEAL—Filed January 19, 1948

Upon consideration of the appellant's motion to dismiss the appeal in the above-entitled cause, and after oral argument on the motion,

It is ordered that the motion to dismiss be, and the same is hereby denied.

By the Court, Maris, Circuit Judge.

January 19, 1948.

[File endorsement omitted.]

the filing of claims with the Administration or its General Agents. The pertinent sections of the Order appear in *Rodinciuc v. United States*, E. D. Pa., — F. Supp. —, — (decided June 10, 1947) and therefore they need not be set forth here. The plaintiff has complied with Section 304.25 of the order by filing a claim with the General Agent of the vessel, which has disallowed the claim. Therefore, the plaintiff is entitled to enforce his claim by court action. However, such action must be brought, since the plaintiff was an employee of the United States through the War Shipping Administration at the time the cause of action arose, in accordance with the terms of the Clarification Act, which provides that the action must be brought pursuant to the Suits in Admiralty Act. Therefore, if he is to recover at all, the plaintiff must bring his action against the United States pursuant to the provisions of the Suits in Admiralty Act, and not against the defendant herein. See *United States v. Lubinski*, 9 Cir., 153 F. (2) 1013.

In the cases of *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 66 S. Ct. 1218, 90 L. Ed. 1534 and *Arid v. Weyerhauser Steamship Company*, 3 Cir., — F. (2) — (decided September 16, 1947), the cause of action arose prior to the enactment of the Clarification Act, and since the plaintiffs in each case did not elect to sue under it, the Act was inapplicable. In *Caldarola v. Eckert*, — U. S. — (decided June 23, 1947), the plaintiff was a longshoreman, and since the Clarification Act concerns "seamen", the Act was of no consequence.

Accordingly, the action is dismissed without prejudice to the plaintiff.

SUPPLEMENTAL OPINION.

January 21, 1948.

GANEY, J.:

This is a request for a rehearing of the Court's determination that no civil action for wages, maintenance and cure, and for loss of personal effects can be maintained against the defendant under the facts as set forth in this Court's opinion of November 26, 1947. The request was granted at the insistence of counsel for the plaintiff who asked that the Clarification Act and certain alleged pertinent authorities be reviewed in the light of the fact that by reason of this Court's holding the rights of seamen employed through the War Shipping Administration would be curtailed.

During the acquisition of substantially our entire Merchant Marine by the United States through the War Shipping Administration and its predecessors, a number of legal problems with respect to the rights of the seamen, employed to man the vessels were created. These seamen, as expressed by their representatives, desired rights enjoyed by seamen employed on privately owned vessels such as those under the Jones Act as well as the existing bargaining agreements entered into between the private vessel owners and the labor unions in preference to those afforded by Federal statutes enacted for the benefit of government employees. The policy of the War Shipping Administration of attempting to give the seamen employed by it the preferred rights was hindered by the fact that they were technically government employees. In this status they could not earn credits toward benefits provided by the Social Security Act while at the same time they were excluded from the benefits of the Civil Service Retirement Act by Executive order. Doubt prevailed since it was thought their rights varied because they were made to depend on the fortuitous relationship¹ of the War Shipping

1. Prior to *Hust v. Moore-McCormack Lines, Inc.*, 328 U. S. 707, 66 S. Ct. 1218, 90 L. Ed. 1534 (June 10, 1946).

[fol. 46] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT

[Title omitted]

Present: Biggs and Maris, Circuit Judges.

ORDER SETTING CASE FOR HEARING BY THE COURT EN BANC

It is hereby ordered that the above-entitled case be heard by the court en banc, and be set down for hearing on Wednesday, February 18, 1948.

By the Court, Maris, Circuit Judge.

January 28, 1948.

[File endorsement omitted.]

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE THIRD CIRCUIT, OCTOBER TERM, 1947

No. 9580

ISAAC GAYNOR, Appellant,

v.

AGWILINES, INC.

On Appeal from the Judgment and Order of the District Court of the United States for the Eastern District of Pennsylvania.

Argued February 18, 1948

Before Biggs, Maris, Goodrich, McLaughlin and O'Connell,
Circuit Judges

OPINION OF THE COURT—Filed August 4, 1948

By MARIS, Circuit Judge:

The plaintiff, Isaac Gaynor, an American seaman, on September 10, 1945, signed shipping articles as a member of the crew of the S. S. Christopher Gadsden for a foreign voyage from Philadelphia for a period not exceeding twelve months. The Christopher Gadsden was a vessel built

Administration or the nature² of, the vessels on which they were employed. Thus if the vessel was owned by, or bareboat-chartered to, the War Shipping Administration, the crew became technically employees of the government; on the other hand, if the vessel was time-chartered to the Administration, the crew remained the private employee of the vessel's owner. In addition the exact status of these seamen was further confused when vessels of the Administration were chartered or made available to another department or agency of the United States. Because of the provisions of the Suits in Admiralty Act provided that suits thereunder may be brought only if the ship involved is a merchant vessel or a tugboat, a seaman employed on a public vessel could not sue the United States for damages. As a result of the conditions hereinabove adverted to, it could not always be determined with any amount of certainty whether a vessel in question was technically a public or a merchant vessel, and as a consequence these seamen were made to rely upon the policy of the Administration for an adjustment of their claims for such injuries.

In 1930 the Supreme Court in *United States Shipping Board Emergency Fleet Corporation v. Lustgarten* (No. 32), 280 U. S. 320, held that a seaman could not recover from the private operator for injuries sustained by him while he was employed on a merchant vessel owned by the United States. The Court based its decision on the rule that the remedies given by the Suits in Admiralty Act were exclusive in all cases where a libel might be filed under it. However on January 18, 1943, in *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, the Supreme Court, in modifying the broad rule laid down in the Lustgarten case, held that the Suits in Admiralty Act did not save the private operator working under a general agency agreement from suit to recover damages for injuries sustained by a third person as a result of its negligent operation of a merchant vessel owned by the United States.

2. Prior to *Lauro v. United States*, 330 U. S. 446, 458-460, 67 S. Ct. 847, 91 L. Ed. —, sub nom. *American Stevedores, Inc. v. Porello*. (March 10, 1947.)

and owned by the United States and was being operated for the United States by the War Shipping Administration which had appointed the defendant Agwilines, Inc., as general agent for the vessel under the standard form of general [fol. 48] agency service agreement in use during World War II.¹

On December 24, 1945 the Christopher Gadsden put in at the port of Charleston, South Carolina. While it was in port the plaintiff obtained shore leave and left the vessel intending to visit relatives in Rand, South Carolina. En route from Charleston as a passenger on a bus on December 25, 1945 he was injured in a highway accident as a result of which he was so disabled as to be unable to rejoin the ship or reengage in his occupation as a seaman. He was paid his wages from September 10 to December 28, 1945. Thereafter he brought the present civil action against the defendant in the district court for the Eastern District of Pennsylvania for the balance of his wages to the end of the voyage, for maintenance and cure for the period of his disability, and for the value of his clothing and personal effects which he left on the vessel and which had not been returned to him. He sought the same relief against the United States in an admiralty suit which he filed in the same court under the Suits in Admiralty Act. The district court dismissed the present complaint without prejudice upon the ground that the plaintiff's sole remedy was his suit in admiralty against the United States and that under the War Shipping Administration Clarification Act he was precluded from enforcing his claim against the defendant, the general agent of the War Shipping Administration. The case thus presents for our consideration the meaning and effect of the Clarification Act of March 24, 1943, 57 Stat. 45 (50 U. S. C. Appendix § 1291), the pertinent provisions of which are set out in a footnote.²

¹ The form of agreement was in all essential respects the same as that which was before the court in *Caldarola v. Eckert*, 332 U. S. 155 (1947). It was authorized by General Order 21 of the War Shipping Administration issued September 22, 1942, 7 F. R. 7561, and also appears in full text in 46 C. F. R. Cum. Supp. § 306.44.

² "That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or for-

[fol. 49] Upon reading the act certain things are at once clear. The first is that it applies only to seamen who are employees of the United States. The second is that its purpose was to make certain that such federally employed seamen are not to be regarded as employees of the United States for the purposes of the United States Employees Compensation Act, the Civil Service Retirement Act, the Act of March 7, 1942 relating to the pay of certain government employees, or the Act of December 2, 1942 providing benefits for the injury, disability, death or detention of employees of contractors of the United States. Instead the [fol. 50] act specifically provides that such federally employed seamen shall with respect to the laws administered by the Public Health Service, the Social Security Act, claims for death, injuries, illness, maintenance and cure, loss of

eign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable, to citizens of the United States employed as seamen on privately owned and operated American vessels. Such seamen, because of the temporary wartime character of their employment by the War Shipping Administration, shall not be considered as officers or employees of the United States for the purposes of the United States Employees Compensation Act, as amended; the Civil Service Retirement Act, as amended; the Act of Congress approved March 7, 1942 (Public Law 490, Seventy-seventh Congress) or the Act entitled 'An Act to provide benefits for the injury, disability, death, or detention of employees of contractors with the United States and certain other persons or reimbursement therefor', approved December 2, 1942 (Public Law 784, Seventy-seventh Congress). Claims arising under clause (1) hereof shall be enforced in the same manner as such claims would be enforced if the seaman were employed on a privately owned and operated

On June 8, 1942, Admiralty Rule 46 was amended to prevent the possibility of a case being heard which might reveal information of value to the enemy. No concurable reveal information of value to the enemy. No concurable rule or amendment existed on the civil side of the Federal Court.

It was against this background, briefly as we have stated it, that Congress passed the so-called Clarification Act of March 24, 1943, in order to restate, clarify and extend the rights of seamen employed through the War Shipping Administration.

The contention of the plaintiff is that the Act did not change in any way the rights and remedies which these seamen might assert or have against the general agents of the vessels. As a basis for his contention, he relies upon the wording of the Act and *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 66 S. Ct. 1218, and *Aird v. Weyerhauser Steamship Company*, 3 Cir., — F. (2) —, (decided September 16, 1947). It is true that the Act does not expressly say that the seamen in question can not bring their actions against the general agents upon the existence or occurrence of the circumstances (which we shall for convenience call rights) listed under clauses (2) and (3) of section 1 (a). However, it seems that the Act, taken as a whole, in connection with its background and the reports of the Senate and House, expresses a clear command by Congress that the enforcement of the various substantive rights of the seamen in question is to be remitted to the new remedy,³ set forth therein, namely, by first presenting

³ H. Rep. No. 2572, 77th Cong., 2nd Sess., states: "Under clause 2 of section 1(a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for seamen set forth in the letter of the Attorney General (September 14, 1942). To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules

the claim to the War Shipping Administration in accordance with the rules and regulations prescribed by it; and then after the claim has been administratively disallowed, by bringing suit on the claim pursuant to the provisions of the Suits in Admiralty Act. Merely because Congress stated that with respect to those rights listed in clauses (2) and (3) of section 1 (a) the seamen employed by the War Shipping Administration shall "have all the rights, benefits, exemptions, privileges and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels," it does not follow that Congress meant that they shall have the same remedies. Congress was not haphazard, but careful in the use of terms. The omission of the word "remedies" was not accidental but intentional. Section 4 of the Act is not an indication that Congress intended that these rights could be enforced against the general agent as heretofore side by side with the new remedy. That section, in part, was intended only to afford the general agent limited protection in the event of the arising of a situation similar to that which arose in *Brady v. Roosevelt S. S. Co.*, supra. If the interpretation placed upon the Clarification Act by the plaintiff was in fact the intention of Congress, passage of the Act, it seems would have been a vain gesture and completely unnecessary. A cause of

or regulations to be prescribed by the Administrator, War Shipping Administration."

S. Rep. No. 62, 78th Cong., states: "Section 1 would provide that officers and crew members who are employed on behalf of the United States through the War Shipping Administration on the same basis as seamen in private employment with respect to rights, benefits, and privileges in connection with employment, particularly in case of death, injury or other casualty. Under the bill, these employees of the War Shipping Administration will have the seamen's right to wages, maintenance, and cure, in case of illness or injury in the ships service. They will have the benefits of the Public Health Service, including marine hospitals, like other seamen. They will have old-age and survivors insurance under the Social Security Act. They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of Suits in Admiralty Act. . . ."

effects, detention, repatriation, collection of wages and bonus, and making of allotments have all of the rights, benefits, exemptions, privileges, and liabilities under law applicable to American seamen employed on privately owned and operated vessels. In other words, the purpose of the act was to provide that seamen, even though they are federal employees, should not in these respects have the normal rights, benefits and privileges of federal employees but should have instead the rights, benefits and privileges of privately employed seamen.

Having thus defined the rights and privileges of federally

American vessel. Any claim referred to in clause (2) or (3) hereof shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act. Any claim, right, or cause of action of or in respect of any such seaman accruing on or after October 1, 1941, and prior to the date of enactment of this section may be enforced, and upon the election of the seaman or his surviving dependent or beneficiary, or his legal representative to do so shall be governed, as if this section had been in effect when such claim, right, or cause of action accrued, such election to be made in accordance with rules and regulations prescribed by the Administrator, War Shipping Administration. Rights of any seaman under the Social Security Act, as amended by subsection (b) (2) and (3), and claims therefor shall be governed solely by the provisions of such Act, so amended. When used in this subsection the term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration. When used in this subsection the terms 'War Shipping Administration' and 'Administrator, War Shipping Administration' shall be deemed to include the United States Maritime Commission with respect to the period beginning October 1, 1941, and ending February 11, 1942, and the term 'seaman' shall be deemed to include any seaman employed as an employee of the United States through the War Shipping Administration on vessels made available to or subchartered to other agencies or departments of the United States."

employed seamen as being those of seamen privately employed the act goes on to provide that with respect to such claims for injuries, maintenance and cure, loss of effects and collection of wages and bonuses, inter alia, the seamen's rights, if administratively disallowed, shall be enforced pursuant to the provisions of the Suits in Admiralty Act, which means by suit in admiralty in personam against the United States. The federally employed seaman is to be entitled to enforce his rights in this way even though the vessel on which he is employed is technically a public vessel of the United States rather than a government merchant vessel or tugboat in which case under the strict terms of the Suits in Admiralty Act³ a suit would not lie against the United States with respect to the seaman's claim.

We think that it was the intent of Congress, when by the Clarification Act it gave to federally employed seamen the rights of private seamen, to restrict the enforcement of the [fol. 51] rights thus given to the suit in personam in admiralty against the United States which the Suits in Admiralty Act authorizes. The seamen's rights were to be measured by those of seamen employed by private ship owners rather than by those of other employees in the government service. But since by hypothesis the seamen in question were in fact employees of the United States and not of private ship owners the rights which were thus given them must necessarily be enforced against their employer, the United States. In reaching this conclusion we are fortified by the legislative history of the act.⁴

³ Section 2 of the Suits in Admiralty Act reads in part as follows: "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation, mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel, or is a tugboat operated by such corporation." 46 U. S. C. § 742.

⁴ The Committee on the Merchant Marine and Fisheries of the House of Representatives in reporting the bill H. R. 7424, which upon reintroduction in the 78th Congress as H. R. 133 became the Clarification Act, discussed in its re-

action which arose prior to the passage of the Act is not before us. Clearly the retroactive provision of the Act gives the seamen in question an election to sue under its provisions or to pursue his former remedies. There is no election provision for the prospective operation of the Act and we are not permitted to read such a provision into it in view of the Act's mandatory language.

The Hust case held that while the government may be technically the employer of a seaman, under the temporary conditions then existing the common-law principle of employer-employee relationship need not obtain in order for the seaman to recover against the private operator "agent", under the Jones Act and that the mere transfer of vessels from private ownership to government control did not deprive the seaman of any of the settled rights which he had prior thereto. Although there are some statements made in that case which might be relied on as supporting the plaintiff's contention in this case, inasmuch as the Supreme Court has expressly stated that it was limiting its discussion to the Act's retroactive provision and was refraining from making any determination as to the Act's prospective operation, we do not feel free to rely on those statements as governing in anywise the issues in this case.

It has been brought to our attention that a petition for rehearing has been filed with the Circuit Court of Appeals for the Third Circuit in the Aird Case. Until the Circuit Court makes a final disposition of that petition, we shall make no further comment on that case.

Accordingly, this Court's Opinion filed November 26, 1947 is affirmed in accordance with the order of December 29, 1947.

[fol. 52] This, of course, is not to say that federally employed seamen may never have the right to sue anyone other than the United States upon a cause of action growing out of their employment. For if the United States should em-

port (H. Rep. 2572, 77th Cong. 2d Sess.) the problem arising out of the employment of seamen by the War Shipping Administration on vessels "owned by or bareboat-chartered to it." The Committee said (p. 8):

"Because of the fact that seamen employed directly by the War Shipping Administration on vessels owned by or bareboat-chartered to it have the status of government employees the Administrator has not been able under existing law to carry out entirely his intended policy of maintaining the peacetime status of seamen in so far as seamen's rights to compensation for injuries, and so forth, wage credits toward social security benefits and various other benefits which seamen have enjoyed and to which they are entitled. The purpose of section 1 of the bill is to correct the situation so as to permit the complete extension into this area of the basic policy of maintaining the private status of merchant seamen for the duration of the war. Section 1 deals with the rights and benefits of seamen who are government employees by virtue of employment through agents of the War Shipping Administration."

The Committee report continued (pp. 12-14):

"A seaman who falls ill or is injured in the service of the ship has, as an incident to his employment and without regard to fault, the right to receive from the shipowner wages and maintenance and cure. The ill or injured seaman gets wages as if he had completed the voyage, and he receives food and lodging (or an equivalent monetary allowance) and treatment at a United States marine hospital . . .

"All of these rights for which court action lies, although maritime in nature, may be enforced either in Federal or State courts. The suits may be brought in admiralty if the seaman so desires, and may then be in rem. No jury is had in admiralty proceedings.

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JUDGMENT.

Before GANEY, J.

AND Now, to wit: November 26th, 1947, in accordance with the opinion of the Court, it is ORDERED that the above action be and the same is hereby dismissed without prejudice, with costs to defendant.

By THE COURT:

Attest:

GILBERT W. LUDWIG,
Deputy Clerk.

ORDER.

AND Now, December 29, 1947, after rehearing and consideration of briefs, the conclusion reached in the Court's opinion of November 26, 1947, dismissing the action without prejudice to the plaintiff is confirmed in conformity with a supplemental opinion subsequently to be filed.

/s/ J. CULLEN GANEY,
J.

[fols. 32-33] IN UNITED STATES CIRCUIT COURT OF APPEALS,
THIRD CIRCUIT

No. 9580

ISAAC GAYNOR, Appellant,

vs.

AGWILINES, INC.

APPENDIX TO BRIEF FOR APPELLEE

[fol. 34]

COMPLAINT

Plaintiff, Isaac Gaynor, claims of Agwilines, Inc., defendant, the sum of Fifteen thousand (\$15,000.00) dollars, with lawful interest thereon, upon a cause of action whereof the following is a true statement:

- (1) Plaintiff, Isaac Gaynor, at all times mentioned herein, was a seaman in the United States Merchant Marine.
- (2) Defendant, Gwilines, Inc., is and at all times mentioned herein was, a corporation duly organized and existing under and by virtue of the laws of the State of Maine.
- (3) Plaintiff, upon information and belief, avers that at all times hereinafter mentioned, defendant possessed, owned, operated and controlled the Steamship "Christopher Gadsden" engaged in coastwise, intercoastal and foreign commerce.
- (4) On or about the 25th day of December, 1945, and at all times mentioned herein, plaintiff entered into shipping articles with defendant as a member of the crew of the Steamship "Christopher Gadsden" in the capacity of utility man at the rate of \$132.50 per month plus 100% bonus, plus overtime and found, on a foreign voyage from Philadelphia, Pennsylvania, to undisclosed ports anywhere in the world and return, for a period of twelve months.

- (5) On or about the 25th day of December, 1945, at or about 6:30 P. M. o'clock, and while the S/S "Christopher Gadsden" was in navigable waters in the port of Charleston, South Carolina, plaintiff, while in the service of the vessel, was ashore on leave and while a passenger on a bus proceeding from Charleston, South Carolina, to Walter-

[fol. 35] boro, South Carolina, he sustained certain injuries which are hereafter more fully set forth by reason of a collision between the said bus and another motor vehicle.

(6) As a result of the collision aforesaid, plaintiff was then and there generally wounded and injured; his ribs were fractured; he sustained injuries to his chest and lungs; his back and spine were wrenched and sprained; his right leg, knee and ankle and the ligaments attached thereto were severely wrenched, bruised, fractured and otherwise injured; he sustained a compound comminuted fracture of the distal end of the right tibia and fibula; he sustained a shock to his nervous system; he has suffered excruciating and agonizing aches, pains and mental anguish; he has been unable to assume his usual duties and occupation for a long period of time in the past, and upon information, believes and therefore avers that his injuries have become aggravated and that he will be disabled from performing his usual occupations and duties in the future; he has in the past and will in the future be compelled to expend large sums of money for medical care and treatment.

(7) During the entire period plaintiff was employed, he well and truly performed all his duties and was obedient to all lawful commands of the Master and other officers of said vessel.

(8) Plaintiff, by virtue of his service upon the vessel, claims wages for the unexpired period of the shipping articles.

Second Cause of Action

Plaintiff re-alleges all the facts set forth in the first cause of action, and in addition thereto, respectfully represents, shows and alleges:

(9) Plaintiff, by virtue of his service upon the vessel, claims maintenance and cure for the period of his dis-[fol. 36] ability in an amount which to your Honorable Court shall seem just and proper upon the trial of this cause.

Third Cause of Action

Plaintiff re-alleges all the facts set forth in the first and second cause of action, and in addition thereto, respectfully represents, shows and alleges:

(10) At the time plaintiff left the said vessel, namely on December 24th, 1945, he left on board his clothing, baggage and personal effects, to the value of \$311.15, none of which have been returned to him.

(11) Plaintiff has made demand upon the defendant for the return of said clothing, baggage and personal effects, but respondent has failed and neglected to return the same.

(12) By reason of the premises, plaintiff makes claim for the value of said clothing, baggage and personal effects in the sum of \$311.15.

All and singular the premises are true and within the admiralty and jurisdiction of the United States and of this Honorable Court.

Wherefore, Isaac Gaynor claims the sum of Fifteen thousand (\$15,000.00) dollars and brings this action to recover same from defendant.

Freedman, Landy and Lorry, by (S.) Abraham E. Freedman.

[fol. 37]

ANSWER

The Answer of Agwilines, Inc., to the summons and complaint of Isaac Gaynor upon an alleged cause of action wherein the sum of Fifteen Thousand Dollars (\$15,000.00) with interest is claimed, which claim is hereby denied, respectfully represents, upon information and belief, as follows:

1. Denied. Defendant denies that it has knowledge or information sufficient to form a belief regarding the status of claimant at the time of filing the within action, but admits that claimant was a seaman and a member of the crew of a vessel of United States registry during his service on Board the Steamship "Christopher Gadsden."

2. Admitted. Defendant admits the allegations of the second paragraph of the Complaint for the purposes of this Answer only.

3. Denied. Defendant denies the allegations of the third paragraph of the Complaint, except that it admits that the Steamship "Christopher Gadsden" was serviced by it as Agent for United States of America, acting by and through

the Administrator, War Shipping Administration, an agency of the United States Government, the owner pro hac vice of said vessel, pursuant to the terms of a General Agency Agreement in the form found in volume 7, 189 of Federal Register (September 25, 1942), page 7562.

4. Denied. Defendant denies the accuracy of the statements of conclusions set forth in the fourth paragraph of the Complaint regarding complainant's employment on board the Steamship "Christopher Gadsden." Defendant avers that complainant was on board the said vessel pursuant to the terms of a written contract embodied in the Shipping Articles of said vessel, and not otherwise. Said contract is a matter of public record in the office of the [fol. 38] United States Shipping Commissioner and available to the complainant.

5. Denied. Defendant denies the allegations of the fifth paragraph of the Complaint, except that it admits that it has been informed that complainant was ashore on leave and while a passenger on a bus proceeding from Charleston, South Carolina, to Waterloo, South Carolina, said bus was in collision with another motor vehicle and as a result of said collision complainant sustained certain personal injuries. Defendant demands strict proof of the allegations of the fifth paragraph of the Complaint, if said allegations be material, at the trial of the cause.

6. Denied. Defendant denies the allegations of the sixth paragraph of the Complaint as set forth therein and avers that the extent and consequences of the said injuries have been grossly exaggerated. Defendant demands strict proof of the allegations of the sixth paragraph of the Complaint, if said allegations be material, at the trial of the cause.

7. Denied. Defendant denies the allegations of the seventh paragraph of the Complaint as statements of conclusions which Defendant is not required to answer.

8. Denied. Defendant denies that complainant is entitled to recover for maintenance and cure from the Defendant herein.

Answering the second cause of action, Defendant reiterates and realleges the foregoing denials and averments of

this answer, and, in addition thereto, respectfully represents, upon information and belief, as follows:

9. Denied. Defendant denies that complainant is entitled to recover maintenance and cure from the Defendant herein.

Answering the third cause of action, Defendant reiterates and realleges the foregoing denials and averments [fol. 39] of this answer, and, in addition thereto, respectfully represents, upon information and belief, as follows:

10. Denied. Defendant denies the allegations of the tenth paragraph of the Complaint, except that it admits that if complainant proves to the satisfactory of your Honorable Court that certain clothing, baggage and personal effects were left by him aboard said vessel and were not returned, that he is entitled to an award in such an amount as your Honorable Court may deem proper for the value of said articles duly proven to have been lost in the manner aforesaid.

11. Admitted. Defendant admits that complainant has made demand for the return of certain clothing, baggage and personal effects but avers that up to the time of filing this Answer it has been unable to locate said personal effects; but if any of said clothing, baggage and/or personal effects belonging to the complainant are located between the date of filing this Answer and the date of trial, the same will be returned to the complainant.

12. Denied. Defendant denies that the value of the clothing, baggage and personal effects alleged to have been lost by complainant was the sum of Three Hundred and Eleven Dollars and Fifteen Cents (\$311.15). Defendant demands strict proof of the value of said articles, to wit, clothing, baggage and personal effects, if same be material, at the trial of the cause.

Defendant denies that all and singular the premises are true, but admits only the Admiralty jurisdiction of the United States and of this Honorable Court, and avers that this Honorable Court does not have jurisdiction of the premises set forth in the Complaint in a Civil Action.

Defendant reiterates and realleges the foregoing denials and averments of this Answer, and, as a full, complete and

affirmative defense to the premises of the Complaint, respectfully alleges, upon information and belief, as follows:

[fol. 40] 13. The Steamship "Christopher Gadsden" was at all times pertinent to the action herein, owned, operated and controlled by the United States of America, acting by and through the Administrator, War Shipping Administration, an agency of the United States Government. Defendant, Agwilines, Inc., acted only as Agent with respect to the said Steamship "Christopher Gadsden", pursuant to the general terms of a standard form of written contract, known as a "General Agency Agreement", between the United States of America, acting by and through the Administrator, War Shipping Administration, and Agwilines, Inc., referred to above. Defendant denies that it owned, operated, or controlled the Steamship "Christopher Gadsden", and avers with reference to said vessel that it acted only as Agent, and denies that it breached any of its duties as Agent; and it further denies that it was the employer of the complainant herein, or any of the officers or members of the crew of said vessel.

Defendant reiterates and realleges the foregoing denials and averments of this Answer, and, as a full, complete and affirmative defense to the premises of the Complaint, respectfully alleges, upon information and belief, as follows:

14. Complainant has failed to comply with the provisions of Public Law 17, 78th Congress (Omnibus Bill—H. R. 133) of March 24th, 1943; Title 50 U. S. C. A., Appendix § 1291. The said Act of Congress and the rules and regulations issued pursuant to the authority of said Act by War Shipping Administration, particularly General Order No. 32, provides, inter alia, that action with respect to claims of the nature asserted in the Complaint herein must be brought pursuant to the Suits in Admiralty Act. Defendant avers, therefore, that complainant has no right to maintain the within Civil Action, and that this Honorable Court lacks jurisdiction in the Civil Action herein by reason of the provisions of Public Law 17 Supra.

[fol. 41] Defendant reiterates and realleges the foregoing denials and averments of this Answer, and, as a full, complete and affirmative defense to the premises of the Com-

plaint, respectfully alleges, upon information and belief, as follows:

15. Any injury which complainant may have sustained while in the service of the Steamship "Christopher Gadsden" was caused solely by his own fault, carelessness and negligence, and/or the fault, carelessness and negligence of a person or persons unknown to Defendant herein, for whom Defendant herein had no responsibility whatsoever, and not by reason of any fault, carelessness or negligence of the Master, Officers or crew of said vessel, nor by reason of any unseaworthiness or unsafe condition of the said vessel, or of her equipment, apparel or tackle.

Wherefore, Defendant denies that complainant is entitled to recover the sum of Fifteen Thousand Dollars (\$15,000.00), or any other sum whatsoever by reason of the premises set forth in the Complaint, and prays that the Complaint herein be dismissed, with costs assessed against complainant.

Krusen, Evans & Shaw, By Rowland C. Evans, Jr.

[fol. 42] EXCERPTS FROM EXHIBIT "A" (SHIPPING ARTICLES)

**"United States Coast Guard
SHIPPING ARTICLES**

'It is also agreed that the Master, Officers, and all other Members of the Crew are employees of the United States subject to the provisions of Public Law No. 17 of the 78th Congress, as amended, and are not employees of AGWILINES, Inc., that all decisions, amendments, and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement.'

[fol. 53] ploy a private person as its agent to operate a government vessel and in the course of the operation of the vessel by the agent a tort should be committed he might

"Under section 1 officers and members of crews employed in vessels by or on behalf of the United States through the War Shipping Administration are for the purpose of determination of the rights and benefits of such seamen and their dependents or beneficiaries referred to those provisions of statutory and general maritime law which are applicable to seamen in private employment.

• • • • •

"The various rights and remedies under statute and general maritime law with respect to death, injury, illness and other casualty to seamen, have been . . . fully set forth . . . Under clause 2 of section 1 (a) these substantive rights would be governed by existing law relating to privately employed seamen. The only modification thereof arises from the remedial provision that they shall be enforced in accordance with the provisions of the Suits in Admiralty Act. This procedure is appropriate in view of the fact that the suits will be against the Government of the United States. In such a suit no provision is made for a jury trial as may otherwise be had in a proceeding such as one under the Jones Act for reasons set forth in the letter of the Attorney General (September 14, 1942). The provision of the Suits in Admiralty Act that suit lies thereunder only if the ship involved is employed as a merchant vessel or a tugboat is waived for the purposes of section 1 so that the claim may be enforced regardless of the nature of the vessel on which the seaman is serving as an employee of the War Shipping Administration. To prevent unnecessary or premature litigation against the United States, it is required that before suit there shall be an administrative disallowance of the same in accord with rules and regulations to be prescribed by the Administrator, War Shipping Administration.

"Other claims under clauses 2 and 3, such as claims for maintenance and cure, collection of wages and

well be liable in damages to those injured thereby.⁵ Likewise if such an operating agent should employ seamen on the vessel being operated by him under shipping articles which indicated that he was operating owner of the vessel

bonuses, and making of allotments, shall also be enforced under the Suits in Admiralty Act."

In the report of the Senate Committee on Commerce upon the bill (S. Rep. 1813, 77th Cong. 2d Sess.) it was said (p. 6):

"The substantive rights under statute and general maritime law with respect to death, injury, or other casualty to seamen employed by the War Shipping Administration would, under section 1, be controlled by the existing law relating to privately employed seamen. The only modification thereof is that the rights shall be enforced in accordance with the provisions of the Suits in Admiralty Act. Other claims, such as claims for maintenance and cure, collection of wages and bonuses, and making of allotments, would also be enforced under that act."

H. R. 7424 did not pass in the 77th Congress and was reintroduced in the 78th Congress as H. R. 133. In reporting the latter bill the House Committee in its report (H. Rep. 107, 78th Cong. 1st Sess.) said (p. 2):

"Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act . . ."

Likewise the Senate Committee in its report (S. Rep. 62, 78th Cong. 1st Sess.) stated (p. 11):

"Under the bill, these employees of the War Shipping Administration will have the seaman's right to wages, maintenance and cure . . . They will continue to have the right to indemnity through court action for injury resulting from unseaworthiness of the vessel or defects in vessel appliances, and they (and their dependents) will have the right to action under the Jones Act (1920) for injury or death resulting from negligence of the employer. Such seamen will have the right to enforce claims for these benefits according to the procedure of the Suits in Admiralty Act . . ."

⁵ Brady v. Roosevelt S. S. Co., 317 U. S. 575 (1943).

and did not disclose that he was acting for the United States; he might well be liable to the seamen for wages and maintenance and cure.⁶ But such claims as these would not be based upon the rights conferred on the seamen by the Clarification Act but rather upon rights which the seamen would have had even if the Clarification Act had never been passed. It follows that unless the plaintiff can establish that wholly independent of the Clarification Act he has an enforceable right against the defendant for wages and maintenance and cure and for the loss of his effects the district court was right in holding that by virtue of the Clarification Act the plaintiff's sole remedy was his suit in admiralty against the United States. This brings us, therefore, to consider whether by virtue of the relationship between the parties independent of the Clarification Act the plaintiff did have such an enforceable right against the defendant.

In *Aird v. Weyerhaeuser Steamship Company*, F. 2d , decided this day, a case involving a claim by a seaman for wages against a general agent of the United States employed under the same standard wartime form of general agency service agreement, this court held that the general agent was not liable to a seaman for his wages where the fact that the United States was owner of the vessel was disclosed on the face of the shipping articles which the seaman signed. In the present case the shipping articles which the plaintiff signed contained the following statement endorsed thereon:

[fol. 54] "It is also agreed that the Master, Officers and all other Members of the Crew, are employees of the United States subject to the provisions of Public Law No. 17 of the 78th Congress, as amended, and are not employees of Agwilines, Inc., that all decisions, amendments, and attachments of the Maritime War Emergency Board shall apply to and become a part of this agreement."

The articles also contained a specific reference to "Agwilines, Inc., as gen. agts. for W S A."

As we pointed out in the *Aird* case the obligation for the payment of wages arises out of the contract of employment,

⁶ Compare *Shilman v. United States*, 164 F. 2d 649 (CCA 2, 1947), cert. den. U. S.

the shipping articles, between the seamen and the master, the latter therein representing the ship and its owners. The same is true of the obligation to provide maintenance and cure for an injured seaman.⁷ For the reasons stated in our opinion in the Aird case we hold that the plaintiff may not assert a claim for wages or maintenance and cure against the defendant.

This leaves for consideration the plaintiff's claim against the defendant for loss of his effects. Such a claim is not contractual in nature but rather sounds in tort.⁸ It is, therefore, maintainable against the defendant only if the latter can be held responsible under the doctrine of respondeat superior for the acts of those individuals who were actually responsible for the plaintiff's loss of his effects. Assuming that the persons responsible for the loss of his effects were the master and members of the crew the plaintiff argues that *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575 (1943) and *Hust v. Moore-McCormack Lines*, 328 U. S. 707 (1946), are authority for the proposition that the defendant is liable to him for their tort. We do not agree.

In the *Brady* case it appeared that the defendant was an operating agent employed by the United States Maritime [fol. 55] Commission to operate a government vessel in peacetime. As operating agent in possession of the vessel the Supreme Court held that it would be answerable to a third person for a maritime tort committed on board. The agency contract involved in the *Brady* case was, however, quite different from the standard wartime general agency service agreement involved in the case now before us. There the defendant was specifically empowered to operate the vessel while here the obligation of the defendant is only to manage the vessel's business and the full control, responsibility and authority with respect to the navigation and management of the vessel itself is by the general agency service agreement specifically entrusted to the mas. as agent and employee of the United States. There are many

⁷ *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 371 (1932); *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 730 (1943).

⁸ *Hutchinson v. Coombs*, Fed. Cas. No. 6955 (D. C. Me. 1825); *The Washington*, 296 F. 158, 167 (D. C. N. Y. 1924).

cogent reasons why, although the Government may have been willing in peacetime to put its vessels into the possession of an agent, it should insist that in wartime it must itself retain full possession and complete control of the navigation of its vessels through its own masters and crews. Some of these reasons are referred to in *Caldarola v. Eckert*, 332 U. S. 155, 159 (1947). Suffice it to say that under the form of agreement involved in the present case the defendant did not become operating agent of the vessel or owner pro hac vice so as to become liable for torts committed on board by the master or members of the crew. On the contrary, as we have pointed out in the Aird case, the responsibility of the defendant under the agreement was merely that of shoreside agent or ship's husband.

But, says the plaintiff, in *Hust v. Moore-McCormack Lines*, 328 U. S. 707 (1946), a general agent for a government vessel acting under the form of general agency service agreement involved in this case was held liable to a seaman in an action under the Jones Act. So much must be admitted. Nonetheless the Hust case is not controlling here. It is true that the opinion of the four justices who constituted the majority of the seven-judge court which sat in that case described the defendant as an operating agent and held that as such it was the "employer" of the injured [fol. 56] plaintiff within the meaning of the Jones Act. But in *Caldarola v. Eckert*, 332 U. S. 155 (1947), decided at the next term, five justices of the Supreme Court (including among them the three who dissented in the Hust case) held, against the vigorous dissent of the four justices who had formed the majority in the Hust case, that the wartime standard form of general agency service agreement employed by the War Shipping Administration and with which we are here concerned did not make the government's general agent the owner pro hac vice of a vessel assigned to it so as to make it liable to a third party, in that case a longshoreman, for a maritime tort committed on the vessel. It thus appears that on the question now under discussion, namely, whether a general agent under the standard form of general agency service agreement is an operating agent in possession of the government vessel assigned to it and, therefore, responsible for maritime torts committed thereon by members of the crew, the Caldarola case compels a negative answer. To the extent that the Hust case was authority

to the contrary it must, therefore, be regarded as overruled by the Calderola case.⁹

We conclude, therefore, that the defendant may not be held liable to the plaintiff for the loss of his effects if that loss resulted from the conduct of the master or members of the crew of the Christopher Gadsden. There is, of course, the possibility that the plaintiff's effects were delivered by the master to the defendant's shoreside employees, not themselves employees of the United States, and wrongfully lost or withheld from the plaintiff by the latter. In such case the defendant might well be liable to the plaintiff for the conduct of its employees resulting in the loss [fol. 57] of his effects. The difficulty with this proposition in the present case, however, is that the plaintiff failed to prove any such facts or, indeed, any facts from which such facts might be inferred. On the contrary the stipulation of facts upon which he submitted his case merely states that he left his effects on board the Christopher Gadsden when he left her on December 24, 1945, that he has demanded their return and that defendant has been unable to locate them and has failed to account for them or compensate him for their loss. In the absence of evidence that employees of the defendant ever had possession of the plaintiff's effects these stipulated facts are clearly insufficient to fasten liability upon the defendant. Moreover even if the somewhat ambiguous language of the defendant's answer to the allegations of the complaint with respect to the loss of the plaintiff's effects may be construed as an admission of liability it is quite clear that it does not constitute an ad-

⁹ In Calderola v. Eckert, 332 U. S. 155, 159 (1947) the court, speaking of the Hust case, said:

"We there held that under the Agency contract the Agent was the 'employer' of an injured seaman as that term is used in the Jones Act, and a seaman could therefore bring the statutory action against such an 'employer.' The Court did not hold that the Agency contract made the Agent for all practical purposes the owner of the vessel. It did not hold that it imposed upon him, as a matter of federal law, duties of care to third persons, more particularly to a stevedore under employment of a concern unloading the vessel pursuant to a contract with the United States."

mission as to the identity or value of the lost effects. Accordingly since neither the identity¹⁰ nor value of the effects was stipulated by the parties and no evidence on the subject was offered by the plaintiff the court did not err in dismissing the complaint as to this cause of action.

The judgment and order of the district court will be affirmed.

CONCURRING OPINION

BIGGS, Circuit Judge, concurring:

For the reasons stated in my concurring opinion in *Aird v. Weyerhaeuser*, No. 9294, I concur in the result reached by this court.

[fol. 58] IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, OCTOBER TERM, 1946

No. 9580

ISAAC GAYNOR, Appellant,

v.

AGWILINES, INC.

Present: Biggs, Maris, Goodrich, McLaughlin and O'Connell, Circuit Judges.

JUDGMENT—Filed August 4, 1948

On Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

¹⁰ The statement contained in the stipulation of facts filed by the parties that "Plaintiff contends that the various items of personal effects are hereafter set forth in Exhibit 'F'" is no more than a stipulation of the fact of plaintiff's contention. It clearly is not an agreement by the defendant that the items were in fact as set forth in the exhibit.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment and order of the said District Court in this case be, and the same is hereby affirmed with costs.

By the Court, Maris, United States Circuit Judge.

August 4, 1948.

[File endorsement omitted.]

[fol. 59] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 60] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 162, Misc. —

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS; GRANTING PETITION FOR CERTIORARI AND TRANSFERRING CASE TO APPELLATE DOCKET—November 22, 1948

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 430. The case is placed on the summary docket and assigned for argument immediately following No. 360.

It is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to the writ of certiorari.